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NANA REGIONAL CORPORATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ENOCH ADAMS, JR., LEROY ADAMS,
ANDREW KOENIG, JERRY NORTON,
DAVID SWAN and JOSEPH SWAN,

Plaintiffs,

Case No.: A:04-cv-0049 (JWS)

v.

TECK COMINCO ALASKA
INCORPORATED,

Defendant,

NANA REGIONAL CORPORATION, and
NORTHWEST ARCTIC BOROUGH,

Intervenor-Defendants.

**JOINT RESPONSE TO
PLAINTIFFS' PENALTY WITNESS
OBJECTIONS AT DOCKETS 225
and 227**

I. INTRODUCTION

In their Objections to Teck Cominco's Penalty Witness List and Motions in Limine to Exclude Witnesses for Failure to Adequately Specify Testimony¹ and their Objections to Teck Cominco's Penalty Phase Witness List and Motions in Limine to Exclude Witnesses and Evidence that is Not Relevant², Plaintiffs ask the Court to

¹ Doc. 225.

² Doc. 227.

1 prohibit more than three-fourths of Teck Cominco's and NANA's penalty witnesses from
2 testifying at trial, even though they were all listed on the preliminary witness lists.

3 Plaintiffs' argument throughout both briefs is fundamentally that the witnesses
4 should be excluded on relevance grounds, either because the description of the witnesses'
5 testimony is not specific enough to show relevancy³ or because the disclosed testimony
6 allegedly is not relevant.⁴ For that reason, Teck Cominco and NANA oppose the two
7 motions in this one response. To assist the Court in its review of Plaintiffs' objections to
8 the remedy phase witnesses as well as the liability phase witnesses,⁵ Teck Cominco and
9 NANA have prepared a chart listing all their witnesses to whom Plaintiffs have objected,
10 Plaintiffs' objections, and a summary of Teck Cominco's and NANA's responses
11 including the statutory penalty factors to which liability witnesses' testimony is relevant.⁶

12 Because the witnesses' testimony is relevant and the descriptions of their
13 testimony include sufficient information to give Plaintiffs an adequate basis for
14 developing cross-examination, Plaintiffs' motions should be denied.

16 II. LEGAL STANDARD

17 The Court ordered the parties to exchange witness lists that include disclosure of
18 testimony expected to be elicited at trial.⁷ The disclosure must be "specific and not
19 general, the purpose being to avoid surprise and delay at trial and to give opposing
20 counsel an adequate basis for developing cross-examination."⁸

21 Federal Rule of Civil Procedure 37 authorizes witness preclusion for failure to
22
23

24 ³ Doc. 225.

25 ⁴ Doc. 227.

26 ⁵ See Doc. 211, 221.

27 ⁶ Exhibit 1, Chart.

28 ⁷ Doc. 177 at 3.

⁸ *Id.*

1 comply with a court order or for failure to disclose information required by Rule 26.⁹

2 But before imposing sanctions for discovery violations under Rule 37, Local Rule 37.1
3 requires a court to consider a number of factors:

- 4 1. the nature of the violation, including the willfulness of the conduct and the
- 5 materiality of the information the party refused to disclose;
- 6 2. the prejudice to the opposing party;
- 7 3. the relationship between the information the party refused to disclose and
- 8 the proposed sanction;
- 9 4. whether a lesser sanction would adequately protect the opposing party and
- 10 deter other discovery violations; and
- 11 5. other factors deemed appropriate by the court or required by law.¹⁰

12 If a party fails to obey a scheduling or other pretrial order, the court may issue any
13 "just" sanction under Rule 16(f) of the Federal Rules of Civil Procedure.¹¹ Rule 16(f)
14 incorporates the remedies authorized by Rule 37(b)(2)(B), (C), (D). But sanctions are
15 precluded unless a party in fact failed to comply with an order.¹²

16 17 **III. ANALYSIS**

18 Teck Cominco and NANA timely filed their list of penalty witnesses, together
19 with a description of the witnesses' testimony.¹³ Plaintiffs ask for the severe sanction of
20

21 ⁹ FRCP 37(b)(2)(B); FRCP 37(c)(1).

22 ¹⁰ D. Ak. LR 37.1; *see also Price v. Seydel*, 961 F.2d 1470, 1474 (9th Cir. 1992)
23 (holding that factors a court should consider in determining whether to admit the
24 testimony of unlisted witnesses include: (1) the possibility of prejudice or surprise to the
25 other party, (2) the ability of the other party to cure the prejudice, (3) the extent to which
waiver of the rule against calling unnamed witnesses would disrupt the orderly and
efficient trial of the case, and (4) bad faith or willfulness in failing to comply with the
court's order.).

26 ¹¹ FRCP 16(f).

27 ¹² *See* FRCP 16(f) ("If a party or party's attorney fails to obey a scheduling or
pretrial order ..."); FRCP 37(b)(2) ("If a party ... fails to obey an order ...").

28 ¹³ Doc. 198, Doc. 203.

1 preclusion of Teck Cominco's and NANA's penalty witnesses based on relevance
2 grounds.

3 Plaintiffs argue that most of Teck Cominco's and NANA's remedy witnesses
4 should be precluded from testifying at trial for the following reasons: (1) the descriptions
5 of 11 witnesses' testimony are not sufficiently specific;¹⁴ (2) the descriptions of 57
6 witnesses' testimony do not list the specific statutory penalty factors about which they
7 will testify¹⁵; (3) testimony regarding the conditions at Kivalina and near the Mine are
8 not relevant¹⁶; (4) testimony regarding the Mine processes and water treatment systems
9 are not relevant¹⁷; and (5) testimony from lab personnel is not relevant.¹⁸ In fact, the
10 descriptions of the witnesses' testimony include enough information to give Plaintiffs an
11 adequate basis for developing cross-examination and their testimony is relevant to the
12 statutory penalty factors.¹⁹ Preclusion of these witnesses is not warranted.

13
14 **A. The Descriptions of Witness Testimony Are Sufficient.**

15 The descriptions of witness testimony in Teck Cominco's and NANA's remedial
16 witness list provide sufficient information to provide Plaintiffs an adequate basis for
17 developing cross-examination.

18
19 **1. The Descriptions Of The 11 Witnesses Plaintiffs Specifically Challenge Are Sufficiently Specific.**

20 Plaintiffs' attacks on the sufficiency of the descriptions of the testimony offered
21

22 ¹⁴ Doc. 225 at 2.

23 ¹⁵ Doc. 225 at 9.

24 ¹⁶ Doc. 227 at 3-7.

25 ¹⁷ Doc. 227 at 7-11.

26 ¹⁸ Doc. 227 at 11-16.

27 ¹⁹ Teck Cominco and NANA have attempted to predict each witness's trial
28 testimony, but to a certain extent a defense witness's testimony will depend on the
evidence Plaintiffs' present at trial. The Plaintiffs' evidence will influence which
defense witnesses and facts are in fact relevant.

1 by 11 specific witnesses all lack merit. With respect to Kathleen Willman, for example,
 2 the plaintiffs' assert that the description is inadequate because "Adams is unaware of
 3 what 'water balance issues' are". This is not a credible claim. The plaintiffs are well
 4 aware that Teck Cominco produced a memo regarding the Red Dog Water Balance Study
 5 in this case. It was attached to Teck Cominco's comments on the Draft 2007 NPDES
 6 Mine Permit (TC 037777 RD - TC 037783 RD) on November 14, 2006.²⁰ Further, the
 7 plaintiffs are necessarily very familiar with Red Dog's water balance in light of their
 8 appeal from the 2007 Mine NPDES permit. Teck Cominco discussed water balance
 9 extensively in its Petition responding to the plaintiffs' EAB Appeal filed April 6, 2007.²¹
 10 The State similarly addresses water balance in Trial Exhibit 1007, the § 401 Certification
 11 of the 2007 permit from which the plaintiffs appealed. Moreover, the plaintiffs produced
 12 numerous documents to Teck Cominco in this case that deal specifically with water
 13 balance. [E.g. bates 002489-2490).²²] In addition, questions regarding water balance
 14 were raised by counsel for the plaintiffs during the deposition of Mark Thompson.
 15 [Thompson 3/5/05 Depo. at 205, 208-209.²³] Mr. Thompson also provided a definition
 16 of water balance in his 10/3/05 Affidavit Regarding TDS which is on file with this court
 17 at Docket 100.²⁴

18 The plaintiffs assert that Mr. Brown should be stricken because American
 19 Meteorburst is not referenced in any trial exhibits. In fact, however, that company is
 20 referenced in Trial Exhibit 1652 at page 7. As well, it has been discussed in several
 21 documents filed in this case and in the KRPC case.²⁵ The plaintiffs argue a lack of
 22 relevance in asserting that "none of the violations Adams will prove at trial . . . involve
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24 ²⁰ Davis Decl. Attachment 4.

25 ²¹ Davis Decl. Attachment 5.

26 ²² Davis Decl. Attachment 1.

27 ²³ Davis Decl. Attachment 2.

28 ²⁴ See ¶ 37 at p.14 [Davis Decl. Attachment 3.]

²⁵ E.g. Docket 100.

1 auto-monitoring equipment or in-stream conductivity". If this is true, the plaintiffs
 2 should be required to dismiss, at a minimum, their Mine COBC claims at Station 7 on
 3 July 27, 1999, July 25, 2001, August 27, 2001, August 28, 2001, August 29, 2001, and at
 4 Station 10 on July 1-9, 14-5, 17-8, 1999 (11 violations alleged), September 12, 1999,
 5 October 1, 1999, October 5, 1999, June 22-28, 2000, July 5-6, 8, 11, 2000, July 7, 2000,
 6 May 28, 29 2002, June 3, 6, 2002 and June 24, 2002. Equipment used by Teck Cominco,
 7 including that obtained from American Meteorburst, is relevant to many of the claims.
 8 Testimony regarding it will enlighten the court with respect to various of the statutory
 9 factors, including the seriousness of a violation, the economic benefit, the history of such
 10 violations, the good faith efforts to comply with permit requirements, and numerous
 11 other factors as may be required by justice. If, on the other hand, the Plaintiffs intend to
 12 proceed with those claims, Teck Cominco should be allowed to present its relevant
 13 witnesses.

14 Similarly, the Plaintiffs object to Mr. Horner on the grounds that they have no
 15 knowledge of the work performed by Ecology and Environment and "nothing other than
 16 the one sentence description with which to prepare for trial". In fact the relevant studies
 17 were produced to the plaintiffs as bates numbers TC 31640 RD to TC 31744 RD.²⁶
 18 Contrary to the suggestion of the plaintiffs, Teck Cominco is not obligated to make them
 19 trial exhibits when it will produce the testimony of Mr. Horner.

20 The plaintiffs' attack on Joyce Tsuji with respect to work performed by Exponent
 21 is unjustified. The plaintiffs are familiar with the studies performed by Exponent. They
 22 have the studies and know that they address marine life and also evaluate caribou. As
 23 well, Ms. Tsuji was asked numerous questions about the work of Exponent in her
 24 deposition.²⁷ The plaintiffs are aware that if they put on testimony regarding the issues
 25 addressed by Exponent, Teck Cominco will rebut their testimony with the testimony of

26 ²⁶ Davis Decl.

27 ²⁷ Davis Decl.

1 Ms. Tsuji.

2 The plaintiffs' assertion that the description of Mr. Lackey's testimony is too broad
3 is similarly unjustified. If the plaintiffs raise an issue at trial that reflects on Teck
4 Cominco's laboratory facilities, and Teck Cominco and NANA expect that is likely to
5 happen, Mr. Lackey will be available to respond. At a minimum, questions involving
6 what laboratories are in existence, what functions they perform, what their cost was and
7 is, why the company chose to have them, and what role they may have played over the
8 years are likely to be tangential to subjects raised by the plaintiffs in the remedial phase.
9 Until the plaintiffs have presented their case, however, all that Teck Cominco and NANA
10 can say with certainty is that Mr. Lackey will address issues involving the Teck Cominco
11 laboratory facilities.

12 Mr. Chapman will discuss "the effect of mine effluent on fish and other aquatic
13 life". In doing so, he will undoubtedly touch on the subjects of "toxicology, TDS, and
14 WET" because each is involved in any discussion of the effect (or lack thereof) of the
15 mine's effluent on those organisms living or unable to live in the receiving waters. As
16 with all of Teck Cominco's and NANA's witnesses, Mr. Chapman's testimony will in
17 some measure be dependent upon the testimony to be offered by the plaintiffs. Even so,
18 the description is very specific and needs no further explanation. To the extent that the
19 plaintiffs complain that they don't know if this testimony will have anything to do with
20 Red Dog Mine, their assertion borders on the ludicrous.²⁸ It is, afterall, Red Dog Mine
21 that is the subject of this lawsuit.

22 According to the plaintiffs, "weather conditions at Red Dog do not pertain to
23 claims", and Mr. Schierman should be stricken as a result. A review of the many papers
24 filed with this court proves otherwise. Weather is a significant factor affecting every
25 aspect of operations in the arctic. It governs whether the rivers and streams were frozen
26 at times when the plaintiffs complain that Teck Cominco should have obtained samples

27
28 ²⁸ See also Trial Exhibits 1653 and 1654.

1 from free-flowing water. It governs whether helicopters and planes are able to be put
2 into service to timely obtain and deliver samples to labs. (Weather prevented the
3 shipment of samples in April 1999, May 8, 2000, May 29, 2000 and February 4, 2001 for
4 BOD & fecal coliform, for example.) It governs many of the conditions that dictate what
5 processes will or won't work in such a harsh environment as is found at Red Dog. It
6 governs the water balance that is so critical to every facet of mine discharge. Every
7 statutory factor that this court will consider in assessing a penalty involves elements that
8 are, at a minimum, affected by weather. The description of Mr. Schierman's testimony is
9 both relevant and specific.

10 The plaintiffs claim that they cannot be sure if Mr. Stubblefield will testify as to
11 the Whole Effluent Toxicity of Red Dog Mine's effluent, or some tool for internet web
12 pages. This is not a serious argument. The description given may be short, but it is very
13 specific.²⁹

14 As for Mr. Stanoway, the plaintiffs know who he is and where he works, and that
15 his work involves such things as Trial Exhibits 1342 and 1231. They similarly know of
16 Mr. Lundberg's involvement in alleged port violations as well as his work with respect to
17 TIE/TRE at Red Dog. As with other defense witnesses, the degree to which their
18 testimony will be more general or more specific will have to depend upon what the
19 plaintiffs offer in the way of evidence at trial. Either way, however, there are no
20 surprises here for the plaintiffs. Rather, it is Teck Cominco and NANA who have to
21 await the plaintiffs' surprises, especially since some of the claims that Mr. Stanoway's
22 testimony will relate to are the recently added claims about which Teck Cominco and
23 NANA have had absolutely no opportunity to conduct discovery. The subjects of these
24 witnesses' testimony are specified, and are consistent with the many disclosures made by
25 the defendants in this case.

26 Mr. Weakley will testify as to "the chemistry and treatment of Red Dog Water".

27
28 ²⁹ See also Trial Exhibits 1011, 1021, 1041, 1045 and 1116.

1 The plaintiffs are well aware that any water source (including Red Dog effluent) has a
 2 unique chemistry, and they are familiar with the fact that Red Dog treats its water.
 3 Moreover, they know that Mr. Weakley is familiar with all aspects of the treatment
 4 process and purposes at the mine. (The plaintiffs are also familiar with testimony he has
 5 given in this case regarding certain aspects of his work involving cadmium.)³⁰ The
 6 Plaintiff's claim otherwise is not credible.

7
 8 **B. Reference to the statutory penalty factors is not required**

9 As to 57 of Teck Cominco's and NANA's remedy phase witnesses, Plaintiffs
 10 assert that without reference to the statutory penalty factors, it is "difficult for Adams to
 11 determine what information the witness will present."³¹ However, the Court's Order did
 12 not specify that one of the statutory penalty factors should be associated with each
 13 witness. The information provided in the witnesses' description of testimony gives
 14 Plaintiffs an adequate basis for developing cross-examination and determining the
 15 statutory penalty factors associated with each witness. Nonetheless, even though the
 16 current descriptions satisfy the Court's Order, Teck Cominco and NANA have
 17 supplemented their initial disclosure to identify specific statutory factors for each
 18 remedy phase witness.³²

19 The descriptions of witness testimony are sufficient to allow Plaintiffs to prepare
 20 their cross-examination, and Plaintiffs' motions should be denied.

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 23
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 25
 26 ³⁰ See, e.g. Weakley declarations of April 2 and June 6, 2005, on file with this
 court

27 ³¹ Doc. 225 at 1.

28 ³² Exhibit 1, Chart.

C. The Witnesses' Testimony is Relevant

If the Court finds a violation of the Clean Water Act, civil penalties are mandatory.³³ But the Court has substantial discretion in setting the amount of penalties.³⁴ To determine the amount of penalties, the Court must consider six factors: (1) the seriousness of the violation; (2) any economic benefit resulting from the violation; (3) any history of such violations; (4) the good-faith efforts to comply with the applicable requirements; (5) the economic effect of the penalty on the violator; and (6) such other matters as justice may require.³⁵

The "seriousness of the violation" statutory factor also is known as the "gravity component."³⁶ EPA's Interim Clean Water Act Settlement Penalty Policy divides the gravity component into four factors: (1) significance of the violation; (2) health and environmental harm; (3) number of effluent limit violations; and (4) significance of non-effluent limit violations.³⁷ The health and environmental harm factor is for violations that "present actual or potential harm to human health or to the environment."³⁸

How all these factors are applied in determining a remedy is left to the Court's discretion. The Ninth Circuit Court of Appeals repeatedly has held that the district court has broad discretion in deciding on a remedy.³⁹ Any testimony going to any of these

³³ 33 U.S.C. § 1319(d); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1397 (9th Cir. 1995).

³⁴ *Leslie Salt*, 55 F.3d at 1397 ("District courts retain the broad discretion to set a penalty commensurate with the defendant's culpability. Indeed, in its consideration of the seriousness of a defendant's violations and 'such other matters as justice may require,' the district court could assess a civil penalty of only a nominal amount."); *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 818 (9th Cir. 2001).

³⁵ 33 U.S.C. § 1319(d).

³⁶ EPA, Interim Clean Water Act Settlement Penalty Policy (March 1, 1995) at 6.

³⁷ *Id.*

³⁸ *Id.* at 8-9.

³⁹ *Borden Ranch Partnership*, 261 F.3d at 818; *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 1001-02 (9th Cir. 2000); *Leslie Salt*, 55 F.3d at 1397.

1 factors therefore is relevant, and potentially helpful to the Court in exercising its
 2 discretion, as to the appropriate remedy in this case. Plaintiffs agree that “evidence that
 3 touches on these penalty factors would be relevant.”⁴⁰

4 **1. Conditions at Kivalina and Near the Mine are Relevant to at least the**
 5 **Seriousness and Good Faith Efforts Factors.**

6 Plaintiffs assert that testimony from defense witnesses regarding conditions,
 7 including regarding subsistence resources and drinking water, at Kivalina and elsewhere
 8 in the Wulik River watershed is not relevant.⁴¹ Plaintiffs object to 27 defense witnesses
 9 on this basis.⁴² Plaintiffs apparently believe, however, that such evidence if offered by
 10 the Plaintiffs’ witnesses is relevant. They state that they intend to offer testimony as to
 11 conditions in Kivalina because it is relevant to the seriousness and duration of violations
 12 statutory factors.⁴³

13 Just as such testimony by Plaintiffs’ witnesses is relevant, so is it relevant when
 14 offered by defense witnesses. Each of the 27 witnesses’ testimony is relevant, at a
 15 minimum, to the seriousness or gravity factor the Court must consider in determining the
 16 remedy. The testimony is relevant to this factor, in part, because it will provide
 17 information about baseline conditions for water quality and environmental status in and
 18 around Kivalina before the mine began operating. The testimony also will show that the
 19 violations about which Plaintiffs complain have caused no harm to health or the
 20 environment. For instance, Bert Adams, Sr., Theodore Booth, and Raymond Hawley are
 21 residents of Kivalina and are “expected to testify regarding [their] observations of the
 22 availability, location, quantity and quality of subsistence resources over the years near
 23

24 ⁴⁰ Doc. 227 at 3.

25 ⁴¹ Doc. 227 at 3-5.

26 ⁴² Doc. 227 at 3-7.

27 ⁴³ Doc. 227 at 3, n.1. Plaintiffs’ descriptions of the testimony of Jerry Norton,
 28 Joseph Swan, Andrew Koenig, and Enoch Adams, are almost identical and indicate that
 each of them will testify regarding subsistence resources and drinking water. Doc. 200 at
 3-4, 7.

1 and around Kivalina.”⁴⁴ They, like Mr. Pannone, Mr. Peterson and Ms. Tsuji, are also
2 expected to testify regarding their observations on issues related to the drinking water in
3 Kivalina. Roland Booth, a resident of Noatak and member of the Red Dog Mine
4 Subsistence Council, is expected to offer testimony regarding “his observations of the
5 availability, location, quantity and quality of subsistence resources over the years near
6 and around Kivalina.”⁴⁵ This testimony will aid the Court in determining an appropriate
7 remedy.

8 Similarly, the testimony of State of Alaska and EPA employees including Scott
9 Arnold, Jim Dau, Alfred DeCicco, Lee Johnson, Al Ott, John Middaugh, Craig Paulsen,
10 and Phyllis Weber-Scannell, like that of Mr. Shock, will be relevant to the seriousness or
11 gravity factor. Their testimony will be relevant to whether the Mine has had any impact
12 on health or the environment and will establish various baseline conditions for water
13 quality and the environment in and around Kivalina.

14 Some of the witnesses’ testimony also will show Teck Cominco’s good faith
15 efforts to comply with applicable regulatory requirements and/or will be relevant to the
16 significance of any non-effluent limit violations. For example, Rose Barr, Chuck
17 Greene, Walter Sampson, and Robert Sheldon are expected to testify about efforts to
18 protect the region’s subsistence resources. Specifically, Robert Sheldon may “testify
19 regarding efforts made by Teck Cominco to protect subsistence resources within the
20 region and to protect the quality of the water into which the mine discharges.”⁴⁶

21 Why the plaintiffs classify Mr. Brown with other witnesses that the plaintiffs have
22 placed in this category is unknown. As the plaintiffs know, and as the motion practice in
23 this case and the earlier KRPC litigation long ago established, Meteorburst equipment
24 was used to measure TDS in Teck Cominco's effluent, and was the cause of various
25

26 ⁴⁴ Doc. 203 at 2, 13.

27 ⁴⁵ Doc. 203 at 2.

28 ⁴⁶ Doc. 203 at 13.

1 alleged violations. Mr. Brown's testimony regarding auto-monitoring equipment and in-
2 stream conductivity is relevant to the statutory factors of economic benefit, history of
3 violations, seriousness of violations, good faith efforts to comply, and other factors
4 required by justice.

5 The descriptions of these witnesses' testimony establish that their testimony is
6 relevant to a number of statutory penalty factors including seriousness and good faith
7 efforts to comply.

8
9 **2. Testimony About Mine Processes and Water Treatment Systems Is Relevant.**

10 According to the plaintiffs, Mike Schierman should not be permitted to testify at
11 the penalty phase of trial because the plaintiffs believe that his testimony is irrelevant to
12 the liability phase. While his testimony affecting such defenses as force majeure clearly is
13 relevant at the liability phase, his testimony is also relevant to the penalty phase, in that
14 the subjects upon which he will give testimony will shed light on such factors as the
15 seriousness of a violation, the economic benefit, the history of such violations, the good
16 faith efforts to comply with permit requirements, and numerous other factors as may be
17 required by justice.

18 As to Mr. Napier, the plaintiffs concede his testimony is relevant, but they wish
19 him stricken anyhow. Mr. Napier is a witness who is going to testify as to varied
20 violations that the Plaintiffs recently added to this case, and about which they have not
21 produced one shred of evidence. Accordingly, Mr. Napier will be responding to
22 whatever it is the Plaintiffs present at trial. As to the new claims, and with respect to the
23 remedy phase of trial, Mr. Napier's testimony will be relevant to each of the statutory
24 factors that the court will consider when determining what penalty to ultimately impose.

25 As for the remainder of the witnesses that the Plaintiffs object to under this
26 category, Mine Processes and Water Treatment Systems, the relevancy to the statutory
27 factors is obvious. The plaintiffs have made clear that they will assert that Teck
28 Cominco should have adopted or refrained from adopting various processes and

1 treatment systems. Teck Cominco will refute the plaintiffs' testimony in this regard with
2 the testimony of witnesses Hall, Hinsbergen, key, Koon, Lundberg, Malone, Martinisko,
3 and others, and will establish why it adopted that which it did, and why it didn't adopt
4 that which it didn't. All of this runs to the statutory factors of economic benefit, history
5 of violations, seriousness of violations, good faith efforts to comply, potential economic
6 impact of penalties, and other factors required by justice.

7 8 **3. Testimony from Lab Personnel Is Clearly Relevant.**

9 The Plaintiffs claim ignorance regarding how the testimony of witnesses working
10 in or with the various laboratories could be relevant to the remedy phase of the trial, and
11 further assert that even if those individuals' testimony is relevant, lab reports are an
12 adequate substitute for their testimony, such that the witnesses should be stricken as
13 redundant. At the same time, the plaintiffs assert that other witnesses must not be
14 relevant because there are NOT any trial exhibits that could substitute for their testimony.
15 The plaintiffs' assertion is absurd. In this regard, they ignore entirely the fact that
16 laboratory procedures are neither developed nor applied in a vacuum. They ignore the
17 fact that laboratory results do not disclose what steps Teck Cominco may have taken to
18 ensure that it fully complied with the varied requirements of its permits when selecting
19 labs, developing protocols or having them developed on its behalf, or ensuring that the
20 best science was applied. Nor can any lab datum found in an analytical report be relied
21 upon to reveal whether it is unreliable as a result of the application of some mandated
22 procedure that simply doesn't work when applied to the very complex water that is Red
23 Dog Creek and/or the effluent that flows into it. Similarly, it is lab personnel, and not lab
24 results, who can testify as to the availability and viability of the procedures and processes
25 that determine whether there has been an economic benefit. The plaintiffs' feigned
26 ignorance does not diminish the fact that the seriousness of a violation, the economic
27 benefit, the history of such violations, the good faith efforts to comply with permit
28 requirements, and numerous other factors as may be required by justice may each be

1 revealed through the testimony that will be offered by these witnesses on the subjects
2 identified in their descriptions. All of these witnesses were long ago disclosed. All their
3 labs and their respective role relative to the issues of this case have long been known by
4 the plaintiffs. Their subjects of their testimony were adequately specified. As to
5 witnesses Barkey, Brown, Capps, Chapman, DeForest, Dryden, Eide, Homer, Lackey,
6 Patton, Prieve, Pillard, Stanoway, Stubblefield, and Weakley, each should be permitted
7 to testify at trial.

8
9 **D. Sanctions are Not Warranted**

10 Plaintiffs ask the Court to prohibit more than three-quarters of Teck Cominco's
11 and NANA's remedy witnesses from testifying at trial. Because Teck Cominco's and
12 NANA's timely filed witness list satisfies the Court's Order and because the witnesses'
13 testimony is relevant, no sanctions are warranted. Even if the descriptions of the
14 witnesses' testimony were not sufficiently specific, preclusion of the majority of Teck
15 Cominco's and NANA's witnesses would not be a just sanction as required by Rules
16 16(f) and 37(b).

17 Looking to the factors courts consider before imposing sanctions for discovery
18 violations demonstrates that preclusion of the witnesses is not warranted.

19 First, the nature of any alleged violation is minimal. Teck Cominco and NANA
20 disclosed these witnesses on the preliminary witness lists and described the witnesses'
21 proffered testimony in the final witness list. The information Plaintiffs seek now is not
22 material in light of the descriptions already provided to Plaintiffs.

23 Second, Plaintiffs are not prejudiced by the descriptions that Teck Cominco and
24 NANA provided in the final witness list. The descriptions provide sufficient information
25 to allow Plaintiffs to prepare for cross-examination, which is still months away.
26 Plaintiffs are not prejudiced or surprised by the inclusion of these witnesses on Teck
27 Cominco's and NANA's final witness list. Further, the Plaintiffs complain they cannot
28 determine which of the statutory factors witnesses' testimony will address. With this

1 response, Teck Cominco and NANA have addressed that complaint.

2 By contrast, Teck Cominco and NANA would be severely and unfairly prejudiced
3 if they were prohibited from calling more than three-quarters of their witnesses.
4

5 **IV. CONCLUSION**

6 Because the witnesses' testimony is relevant and the descriptions of their
7 testimony include sufficient information to give Plaintiffs an adequate basis for
8 developing cross-examination, Plaintiffs' motions should be denied.
9

10 Dated: February 19, 2008

Respectfully submitted,

11
12 HELLER EHRMAN LLP
13 Intervenor-Defendant
14 NANA REGIONAL CORP.

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23 Dated: February 19, 2008

Respectfully submitted,

24 HARTIG RHODES HOGE & LEKISCH
25 Defendant
26 TECK COMINCO ALASKA INCORPORATED

27 By /s/ Sean Halloran
28 SEAN HALLORAN

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing JOINT RESPONSE TO PLAINTIFFS' PENALTY WITNESS OBJECTIONS AT DOCKETS 225 AND 227 was served via the method indicated below this 19th day of February, 2008, on the following parties:

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